THE BANK OF NOVA SCOTIA BHD & ANOR v. LION DRI SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ONG CHEE KWAN JC
[ORIGINATING SUMMONS NO: WA-24NCC-248-05-2019]
26 OCTOBER 2020

COMPANY LAW: *Oppression – Allegation of – Bank/lender solely held debenture over assets and undertakings as securities for facilities granted to company/borrower – Allegations by bank/debenture holder that directors of company oppressive – Whether bank had locus standi – Whether bank 'debenture holders' within meaning of s. 346 of Companies Act 2016 – Whether there were continuing acts of oppression in existence capable of remedy – Whether claim was corporate complaint actionable by debenture holder – Whether action abuse of process – Whether 'debenture holder' under s. 346 meant only holders of debt instruments that were tradable and excluded holders of security given to bank in consideration of commercial loans granted to company – Whether there must exist class of debenture holders before one or more could apply under s. 346 – Approach to be taken in determining whether corporate wrongs could be basis for oppression action*

CIVIL PROCEDURE: *Striking out – Application for – Application to strike out originating summons – Bank/debenture holder commenced action against company directors – Allegations by bank/debenture holder that directors of company oppressive – Whether bank had locus standi – Whether bank 'debenture holders' within meaning of s. 346 of Companies Act 2016 – Whether there were continuing acts of oppression capable of remedy – Whether claim was corporate complaint actionable by debenture holder – Whether action abuse of process – Whether originating summons ought to be struck out – Rules of Court 2012, O. 18 r. 19*

Pursuant to an offtake agreement between the first defendant and Megasteel Sdn Bhd ('Megasteel'), the former agreed to manufacture and supply hot direct reduced iron ('product') to the latter. To purchase iron ore and to finance the construction of its plant, the first defendant obtained facilities from the plaintiffs. As one of the securities, the first plaintiff, as a security agent, solely held a debenture over the assets and undertakings of the first defendant, on behalf of the second plaintiff. Manufacture of the product began and the first defendant would drawdown on the facilities to purchase the iron ore and sell the product to Megasteel. However, Megasteel did not make the requisite payments to the first defendant for the product in full or on time. By the 2016 financial year, the entirety of Megasteel trade receivables were impaired. The first defendant later ceased operation and no further drawdowns were made by the first defendant from the facilities. The plaintiffs filed the present originating summons ('OS') pursuant to s. 346 of the Companies Act 2016 ('Act') against the defendants, seeking (i) various declarations that the affairs of the first defendant have been conducted and/or the powers of the second and third defendants, the directors of the first

defendant, have been exercised in a manner oppressive to and/or in disregard of the interests of the plaintiffs as the debenture holders of the first defendant and/or that the defendants have procured and/or caused to be done acts which have unfairly discriminated against or which were otherwise prejudicial to the plaintiffs; (ii) an order that all the defendants be jointly and severally liable to pay the first plaintiff the sum of RM81,976,317.38 with interest; and (iii) an order that all the defendants be liable to pay the second plaintiff the sum of RM36,774,393.97 with interest. The acts of the second and third defendants that were complained of were (i) despite the dire financial position of the first defendant and Megasteel, the second and third defendants abused their position as directors of the first defendant and Megasteel by refusing or failing to cause the first defendant to stop trading with Megasteel or take active steps to collect the trade receivables owed by Megasteel, causing the first defendants receivables to increase from RM25.6 million in 2008 to RM583.9 million in 2017; (ii) against commercial reason, the second and third defendants allowed the first defendant to continue the supply of the product to Megasteel, eventually running the first defendant's business into the ground to the prejudice of the plaintiffs' interest in the first defendant; (iii) the second and third defendants ought to have stopped the first defendant from continuing its trades with Megasteel when the first defendant did not receive payments from Megasteel. The second and third defendants also failed to stop the first defendant from drawing on the facilities from the first plaintiff; (iv) as a result of the second and third defendant's conduct, the value of the first defendant's assets and undertaking charged to the plaintiffs under the debenture were severely diminished; (v) due to the actions and/or omissions, the second and third defendants preferred Megasteel's interests over that of the first defendant and the plaintiffs; and (vi) the first defendant defaulted on the repayments of the facilities, causing loss to the plaintiffs. In response, the defendants applied, pursuant to O. 18 r. 19 of the Rules of Court 2012, to strike out the OS on the grounds (i) the plaintiffs had no *locus standi* as they were not 'debenture holders' within the meaning of s. 346 of the Act; (ii) there were no continuing acts of oppression in existence at the time of the filing of the OS which were capable of remedy by the court; (iii) the claims in the OS were a corporate complaint which was actionable by the first defendant and not by a debenture holder under s. 346 of the Act; and (iv) the OS was an abuse of process and/or disclosed no reasonable cause of action. The issues that arose for adjudication were (i) whether 'debenture holder' under s. 346 of the Act meant only holders of debt instruments that were tradable and excluded holders of security given to bankers in consideration of commercial loans granted to the company; (ii) whether there must exist a class of debenture holders before one or more of them could apply under s. 346 of the Act; and (iii) the approach to be taken in determining whether corporate wrongs could be the basis for an oppression action under s. 346 of the Act.

Held (striking out originating summons with costs):

(1) In construing the meaning of the word 'debenture holder' in s. 346, the court must confine itself to the meaning as expressed and defined in s. 2 of the Act. Resultant compendious reading of the definitions of 'debentures' and 'securities' clearly showed that 'debenture', for the purpose of the Act (unless the context otherwise requires), means debt or financial instruments issued for fundraising or arising from instruments or transaction effected in the money market. In fact, the entire subdivision 10 of Part III, Division 1 of the Act dealing with 'debentures' refers to the debentures as debt instruments that are issued by the company and offered to the public for subscriptions. That this is so is further evidence from s. 346(2)(c) of the Act which provides that the court, on an application made under s. 346, may in making an order with the view to bringing to an end or remedying the matters complained of, provide for the purchase of the debentures of the company by other debenture holders of the company or by the company itself. Such an order would not be possible in respect of a debenture creating security type. (paras 37 & 38)

(2) The plaintiffs were not 'debenture holders' under s. 346 of the Act and, thus, did not have the *locus standi* to make an application under the said section. If the court were to find that the plaintiffs had the *locus standi* to commence an action under s. 346 of the Act, it would open the floodgates for banks or lenders who have obtained debentures as a form of security, in the sense that of a debenture holder document creating a charge over assets in respect of commercial loans, to mount an action under s. 346 to recover the outstanding debts from the shareholders and/or directors of the subject company personally when faced with perceived difficulties or the possibility of a shortfall in the recovery of their loans. This would open the floodgates to permit creditors of the company to file oppression actions as a means of recovering their debts. (paras 43 & 45)

(3) The first plaintiff lacked the *locus standi* to invoke s. 346 of the Act by reason of the fact that the first plaintiffs was the sole debenture holder of the first defendant. Section 346 of the Act is applicable only where a minority within a class has been oppressed by the majority of that class or where the powers of the directors are being exercised in a manner that is oppressive to the minority of the said class. The second plaintiff did not qualify as a complainant under s. 346 of the Act. In the context of actions brought under s. 346 by persons who claim to have beneficial interest in the shares of a company through a registered member, by reference to the express language of s. 181 of the now repealed Companies Act 1965 (the precursor to the present s. 346), the courts have held that such persons lack the requisite *locus standi* to bring an action under the section. Mere knowledge that the second plaintiff was

A the beneficiary of the debenture was insufficient to give rise to an estoppel for the simple reason that the interests of the first and second plaintiffs were aligned. The first plaintiff, as the registered debenture holder, was already seeking to enforce its rights (which was aligned with the second plaintiff), under the debenture. The application of the general
B rule did not prejudice the second plaintiff's rights and was neither unfair nor unjust. (paras 64, 66 & 70)

(4) The plaintiffs' complaint fell into two broad categories, namely breaches of (i) the facilities and/or the offtake agreement; and (ii) the directors' duties by the second and third defendants by preferring Megasteel to the
C detriment of the first defendant. Neither of these could properly form the juridical basis for an action under s. 346 of the Act which was not the platform to redress or improve upon contractual claims. The claims for breaches of the facilities and the offtake agreement were based on the underlying contractual agreements governing the relationship between
D the first defendant and the plaintiffs and between the first defendant and Megasteel. The rights and remedies lie in the enforcement of their respective contracts and not by way of an oppression action. The plaintiffs' case was a clear case of misconduct *simpliciter*. The claim was nothing more than a debt-recovery action dressed up as a claim for
E oppression. This was an abuse of the court process and for this reason, the OS must fail. (paras 116, 117 & 121)

(5) The plaintiffs' complaints were that the second and third defendants had permitted the first defendant to continue trading with Megasteel despite the accumulation of trade receivables and the deteriorating financial
F situations of Megasteel. However, the factual matrix for the complaints, even if amounting to oppressive, ended when the first defendant ceased operations. There were no further drawdowns that were made from the plaintiffs. There was no oppression that the court could remedy. The fact that the debt remained outstanding did not mean that the oppression
G was in existence that would allow court remedy. (paras 129 & 130)

(6) An action under s. 346 of the Act does not lie where a claimant has the power to stop the allegedly oppressive acts and/or possesses the power to exercise self-help. The power to stop the oppressive or unfairly prejudicial acts or to exercise self-help negates 'unfair prejudice' as
H control rests with the claimant. The plaintiffs, pursuant to and in connection with the facilities, obtained a multitude of securities from the first defendant, including the debenture and the deed of assignment of the offtake agreement. These accorded the plaintiffs significant rights and powers over the assets and undertaking of the first defendant. The
I plaintiffs had the means or power to put an end to the alleged oppressive acts complained of but have chosen not to and, instead, brought this action. It could not be said that the plaintiffs had no control over the first

defendant's transactions with Megasteel. They were able to appoint a receiver and manager to take control of the first defendant's business and discontinue the supply to Megasteel if they wanted to. (paras 137, 140, 144 & 145)

Case(s) referred to:

A R Evans Capital Partners Limited v. Gen2 Partners Inc [2012] HKCU 1284 ***(refd)***
Abdul Aziz Atan & Ors v. Ladang Rengo Malay Estate Sdn Bhd [1985] 1 CLJ 255; [1985] CLJ (Rep) 370 HC ***(refd)***
Abdul Rahim Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 4 CLJ 551 CA ***(refd)***
BCE Inc v. 1976 Debentureholders [2009] SCC 69 ***(refd)***
British American Nickel Corporation v. O' Brien [1927] AC 369 ***(refd)***
Foss v. Harbottle [1843] 2 Hare 461 ***(refd)***
Galantis v. Alexiou [2019] 1 WLR 3636 ***(refd)***
Gill v. Donald Humberstone & Co, Ltd [1963] 1 WLR 929 ***(refd)***
Handevel Pty Ltd v. Comptroller of Stamps (Vic) [1985] 157 CLR 177 ***(refd)***
Jet-Tech Materials Sdn Bhd & Anor v. Yushiro Chemical Industry Co Ltd & Ors And Another Appeal [2013] 2 CLJ 277 FC ***(refd)***
Johnson v. Gore Wood & Company [2001] 1 All ER 481 ***(refd)***
Kang Choon Leu v. Wintoni Group Bhd & Ors [2016] 1 LNS 611 HC ***(refd)***
Kesatuan Pekerja-pekerja Bukan Eksekutif Maybank Bhd v. Kesatuan Kebangsaan Pekerja-pekerja Bank & Anor [2017] 4 CLJ 265 FC ***(refd)***
Koh Jui Hiong & Ors v. Ki Tak Sang & Another Appeal [2014] 2 CLJ 401 FC ***(refd)***
Kumagai Gumi Co Ltd v. Zenecon-Kumagai Sdn Bhd & Ors And Another Application [1994] 1 LNS 73 HC ***(refd)***
Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors [2005] 3 CLJ 355 CA ***(refd)***
Ng Kek Wee v. Sim City Technology [2014] SGCA 47 ***(refd)***
Ng Kek Wee v. Sim City Technology Ltd [2014] 4 SLR 723 ***(refd)***
Nina Kung v. Tan Man Kou (Re Chime Corporation Ltd) [2004] 7 HKCFAR 546 ***(refd)***
NV Alliance Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2012] 2 CLJ 211 CA ***(refd)***
Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor [1996] 4 CLJ 716 FC ***(refd)***
Pioneer Haven Sdn Bhd v. Ho Hup Construction Company Bhd & Anor And Other Appeals [2012] 5 CLJ 169 CA ***(refd)***
Re A Company (No 005287 of 1985) [1986] 1 WLR 281 ***(refd)***
Re Bellador Silk Ltd [1965] 1 All ER 667 ***(refd)***
Re Charnley Davies Ltd (No 2) [1990] BCLC 760 ***(refd)***
Re Chime Corporation Ltd [2004] HKCU 1453 ***(refd)***
Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung [1978] 1 LNS 170 PC ***(refd)***
Re Shun Tak Holdings Ltd [2009] 6 HKC 364 ***(refd)***
Rea v. Wildeboer [2015] OJ No 2651 ***(refd)***
Sevilleja v. Marex Financial Ltd [2020] UKSC 31 ***(refd)***
Stainer v. Lee [2010] EWHC 1539 (Ch) ***(refd)***
Syed Mubarak Syed Ahmad v. Majlis Peguam Malaysia [2000] 3 CLJ 659 CA ***(refd)***
Tan Sri Eric Chia Eng Hock v. PP [2007] 1 CLJ 565 FC ***(refd)***
Townsing Henry George v. Jenton Overseas Investment Pte Ltd [2007] 2 SLR(R) 597 ***(refd)***
TPC v. ABU & Anor [1983] 1 LNS 15 HC ***(refd)***
Waddington Ltd v. Chan Chun Hoo Thomas & Ors [2009] 4 HKC 381 ***(refd)***

Yap Sing Hock & Anor v. PP [1992] 4 CLJ 1950; [1992] 1 CLJ (Rep) 356 SC ***(refd)***
Yeng Hing Enterprise Sdn Bhd v. Liow Su Fah [1979] 1 LNS 130 FC ***(refd)***
Yushiro Chemical Industry Co Ltd & Ors v. Jet-Tech Materials Sdn Bhd & Ors And Another Appeal [2013] 5 CLJ 790 CA ***(refd)***

Legislation referred to:
Capital Markets and Services Act 2007, s. 2
Companies Act 1965 (repealed), ss. 132C, 181(1)
Companies Act 2016, ss. 2(1), 346(1)(a), (b), (2)(c), 347(3), 352(6)(a), 374, 375, 379, 384, 385, 386, 388, 392, 408, 527, 592
Interpretation Acts 1948 and 1967, s. 17A
Rules of Court 2012, O. 18 r. 19

Canada Business Corporations Act 1985 [Canada], ss. 238, 241, 248, 346
Companies Act [Sing], s. 216(2)(c)
Companies Act 1985 [UK], ss. 459, 461(1)

Other source(s) referred to:
Seah Chi-Ling, *Bondholder Rights and the s. 216 Oppression Remedy* [2011] SJLS 432, pp 433 to 434

For the plaintiffs - Lee Shih & Nathalie Ker; M/s Lim Chee Wee Partnership
For the 1st defendant - Robert Low, Ooi Huey Ling, Chong Lip Yi & Elaine Koh; M/s Ranjit Ooi & Robert Low
For the 2nd & 3rd defendants - S Suhendran & Rodney Gan; M/s Sanjay Mohan
Watching brief for the 2nd & 3rd defendants - Ngam Kah Jing

Reported by Najib Tamby

JUDGMENT

Ong Chee Kwan JC:

[1] There is no reported decision in Malaysia where a debenture holder filed an action seeking reliefs for oppression under s. 346 of the Companies Act 2016 ('the CA 2016'). This judgment deals with whether 'debenture holder' under s. 346 of the CA 2016 means only holders of debt instruments that are tradeable and excludes holders of security given to bankers in consideration of commercial loans granted to the company. The judgment also considers, *inter alia*, if there must exist a class of debenture holders before one or more of them can apply under s. 346 of the CA 2016 and the approach to be taken in determining whether corporate wrongs can be the basis for an oppression action under s. 346 of the CA 2016.

Background Facts

[2] Pursuant to an offtake agreement dated 16 July 2007 ('offtake agreement') between Lion DRI Sdn Bhd ('first defendant') and Megasteel Sdn Bhd ('Megasteel'), the first defendant agreed to manufacture and supply hot direct reduced iron ('the product') to Megasteel for use by Megasteel to manufacture steel products known as hot-rolled coils and cold-rolled coils.

[3] To perform the offtake agreement, the first defendant needed funds to purchase iron ore which was the raw materials to manufacture the product and to finance the construction of its plant ('the DRI plant'). The DRI plant was to be situated on lands belonging to Megasteel and on which Megasteel's manufacturing facility was also located.

[4] The first defendant had entered into a long lease of a portion of Megasteel's lands where the DRI plant was constructed and located.

[5] The first defendant looked to the plaintiffs for the funds. It obtained banking facilities ('the facilities') from the plaintiffs. In return, the plaintiffs were granted various securities for the facilities. One such securities was a debenture over the assets and undertakings of the first defendant ('the debenture').

[6] The debenture was held by first plaintiff as security agent for the facilities on behalf of the second plaintiff. The first plaintiff was the sole debenture holder of the first defendant.

[7] In mid-2008, the first defendant began to manufacture the product for on-sale to Megasteel. The first defendant would drawdown on the facilities granted by the plaintiffs to purchase the iron ore to manufacture the products at its DRI plant on the leased land and the first defendant would then sell the product to Megasteel who in turn, would use the product to manufacture its steel products for on-sale to its customers.

[8] However, Megasteel did not make the requisite payments to the first defendant for the product in full or on time. In fact, the trade receivables due from Megasteel to the first defendant had increased steadily with impairment losses recorded from the 2012 financial year onwards. By the 2016 financial year, the entirety of the Megasteel trade receivables were impaired.

[9] It is not in dispute that the first defendant had ceased operation around 31 January 2016 or earlier. It is also not in dispute that no further drawdowns were made by the first defendant from the facilities by the time the first defendant ceased its operation in early 2016.

[10] The second and third defendants were the directors of the first defendant at the material times. They were also directors of Megasteel.

The Complaints And The OS

[11] On 10 May 2019, the plaintiffs (*qua* debenture holder of first defendant) filed the present originating summons under s. 346 of the CA 2016 against the defendants ('the OS').

[12] The thrust of the plaintiffs' complaints in the OS is that the second defendant and third defendants, as directors of the first defendant, had exercised their powers in a manner that was oppressive to the plaintiffs as a debenture holder of the first defendant. It is claimed that the second and

A third defendants had committed acts which unfairly prejudiced, discriminated and/or were detrimental to and/or in disregard of the plaintiffs' interests as the holder of the debenture. The acts complained of are that:

B (i) despite the dire financial position of both the first defendant and Megasteel, the second and third defendants had abused their position as directors of the first defendant and Megasteel by refusing or failing to cause the first defendant to stop trading with Megasteel or take active steps to collect the trade receivables owed by Megasteel causing the first defendant's receivables to increase from RM25.6 million in 2008 to C RM583.9 million in 2017;

(ii) against commercial reason, the second and third defendants had allowed the first defendant to continue the supply of the product to Megasteel, eventually running the first defendant's business into the ground to the prejudice of the plaintiffs' interest in the first defendant;

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(iii) the second and third defendants ought to have stopped the first defendant from continuing its trades with Megasteel when the first defendant did not receive payments from Megasteel. The second and third defendants also failed to stop the first defendant from drawing on the facilities from the first plaintiff;

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(iv) as a result of the second and third defendants' aforesaid conduct, the value of the first defendant's assets and undertaking charged to the plaintiffs under the debenture were severely diminished;

(v) due to their aforesaid actions and/or omissions, the second and third F defendants had preferred Megasteel's interests over that of the first defendant and the plaintiffs; and

(vi) the first defendant had defaulted on the repayments of the facilities, causing loss to the plaintiffs.

G **[13]** The plaintiffs are seeking the following reliefs under the OS:

(i) by prayer 1, the plaintiffs seek various declarations that the affairs of the first defendant have been conducted and or the powers of the directors have been exercised in a manner oppressive to and or in disregard of the interests of the plaintiffs as debenture holders of the first defendant and H or that the defendants have procured and or caused to be done acts which have unfairly discriminated against or which were otherwise prejudicial to the plaintiffs as debenture holders of the first defendant;

(ii) by prayers 2 and 3, the plaintiffs seek an order that all the defendants be jointly and severally liable to pay the first plaintiff the sum of I RM81,976,317.38 with interest; and

(ii) by prayers 4 & 5, the plaintiffs seek an order that all the defendants be liable to pay the second plaintiff, the sum of RM36,774,393.97 with interest.

The sums prayed for are sums due under the facilities.

[14] The defendants have applied under O. 18 r. 19 of the Rules of Court 2012 ('the 2012 Rules') to strike out the OS. The grounds are:

(i) the plaintiffs have no *locus standi* as they are not 'debenture holders' within the meaning of s. 346 of the CA 2016;

(ii) there are no continuing acts of oppression in existence at the time of filing the OS which are capable of remedy by this court;

(iii) the gist of the claims in the OS is a corporate complaint which is actionable by the first defendant and not by a debenture holder under s. 346 of the CA 2016; and

(iv) the OS is an abuse of process and/or discloses no reasonable cause of action.

No *Locus Standi*

[15] Section 346(1) of the CA 2016 reads as follows:

> 346. Remedy in cases of an oppression
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> (1) Any member or debenture holder of a company may apply to the Court for an order under this section on the ground:
>
> (a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or debenture holders including himself or in disregard of his or their interests as members, shareholders or debenture holders of the company; or
>
> (b) that some act of the company has been done or is threatened or that some resolution of the members, debenture holders or any class has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or debenture holders, including himself.

[16] Section 346(1) provides for two categories of persons who may make a claim for oppression, namely:

(i) a member of a company; and

(ii) a debenture holder of a company.

[17] The phrase 'debenture holder' appears in s. 181(1) of the Companies Act 1965 ('the CA 1965') and in the corresponding legislations of Singapore and Ghana. In contradistinction, the phrase is not found in the equipollent provisions of UK, Australia, India and New Zealand despite the fact that

such legislations were considered by the Malaysian committee tasked to advise on the form and content of the CA 1965. (See Hansard for Malaysian Companies Bills and Explanatory Statement of Malaysian Companies Bill).

[18] The history of the phrase was examined in an article by Seah Chi-Ling "*Bondholder Rights and the s. 216 Oppression Remedy*" [2011] SJLS 432 at pp. 433 to 434. According to the learned author, the inclusion of "debenture holder" in the CA 1965 and in the Singapore Companies Act was based on the Gower Report (1961) prepared for the purposes of passing the Companies Act of Ghana ('the Gower report'). In the Gower report, the operative 'oppression' provisions proposed by Prof Gower (as contained in s. 218 of the Draft Companies Code Bill of Ghana) included a reference to 'debenture holder'.

[19] The reasoning is explained in para. 10 of the Gower report in the following manner:

> 10. If, however, the formula in subsection (1)(b) is to usurp the field formerly filled by "fraud on the minority" it seems clear that the remedy must be available to debenture-holders as well as shareholders. Under the existing law they too may be able to set aside a resolution on the ground of fraud on the minority: see *British America Nickel Corpn. v. O'Brien* [1927] A.C. 369, P.C. Moreover under the modern conditions the distinction between shareholders and debenture holders is often a fine one, and the latter can be oppressed (or can oppress) as well as the former. Hence I suggest that it would be useful if s. 218 were available to them (and against them).

[20] The basis of the recommendation was that, as the section was intended to protect against a 'fraud on the minority', this protection should be available to 'debenture holders' as they are equally susceptible to such fraud, citing *British American Nickel Corporation v. O' Brien* [1927] AC 369. In that case:

(i) at a meeting of bondholders, multiple minority bondholders were subject of a fraud on the minority when the required majority would not have been obtained but for the vote of one holder of a large number of bonds, whose support of the scheme was obtained by the promise of a large block of ordinary stock, an arrangement not disclosed in the scheme; and

(ii) the resolution was held invalid as, *inter alia*, the major bondholder in voting had not treated the interest of the whole class of bondholders as the dominant consideration.

[21] Prof Gower was concerned that:

(i) minority bondholders might be prejudiced by actions taken by majority bondholders and suggested that the oppression remedy must be available to them as well. Thus, the inclusion of "debenture holders" in s. 218 in the Ghana legislation; and

(ii) Prof Gower's recommendation to include 'debenture holders' within the oppression remedy was to safeguard 'debenture holders' against "fraud on the minority" type problems.

[22] The learned author, Seah Chi-Ling explained the inclusion of 'debenture holders' in the oppression provisions in this way:

> While the definition in the CA is far from clear, it is generally understood to cover long-term notes and bonds (hereinafter, collectively, "bonds") issued by companies. 'Debenture holders' therefore essentially encompasses holders of corporate notes or bonds, whether privately or publicly issued (hereinafter, collectively, "bondholders"). Like shareholders, bondholders are, under the terms of the indenture or trust deed governing the bond issuance (hereinafter, collectively, "bond contracts"), generally bound by the principle of majority rule in respect of any proposed actions affecting the bonds as a class. To the extent that bondholders, like shareholders, are vulnerable to an unfair exercise of majority power, their express inclusion in s. 216 seems apposite.

[23] In reliance on the aforesaid, learned counsel for the defendants made two points. Firstly, the words 'debenture holder' in s. 346 of the CA 2016 should be construed to mean only holders of debt instruments that are tradeable as was intended by Prof Gower. Secondly, there must exist a class of debenture holders before one or more of them can apply under s. 346 of the CA 2016. This is because the 'debenture holder' was included in s. 346 specifically to protect minority debenture holders from the majority debenture holders within a body of debenture holders. The inclusion was not intended to apply where there is only a single debenture holder in the company claiming that its interests have been disregarded or oppressed and or that its interests have been subordinated to the interests of other classes of stakeholders in the company.

[24] The learned author Seah Chi-Ling proffered some arguments in favour of confining the meaning of 'holder of debenture' to only minority debenture holders from a body of debenture holders.

Section 346 And Definition Of "Debenture"

[25] Section 181(1) of the CA 1965 now appears as s. 346 of the CA 2016.

[26] In relation to the first point, learned counsel for the second and third defendants contended that 'debenture holders' within s. 346 of the CA 2016 means only members of the public who invest in debt instruments issued as 'debentures' by a company to raise corporate finance. These 'debentures' are securities of the company akin to shares. According to learned counsel, s. 346 is part of a statutory regime under the CA 2016 designed to protect minority debenture holders against the oppression of majority debenture holders in the same way as the section is designed to protect minority shareholders.

[27] According to learned counsel for the second and third defendants, a 'debenture holder' under s. 346 does not include a single banker making commercial loans to a company as the bank in such a case is not an investor in the securities of the company.

[28] In support, learned counsel relied on the definition of 'debenture' in s. 2 of the CA 2016:

(i) Section 2(1) of the CA 2016 defines "debenture" thus:

> 'debenture' includes debenture stocks, bonds, sukuk, notes and **any other securities** of a corporation whether constituting a charge on the assets of the corporation or not;
>
> (emphasis added)

(ii) Section 2(1) of the Companies Act, 2016 defines "securities" as:

> 'Securities' has the meaning assigned to it in the Capital Markets and Services Act 2007;

(iii) The preamble of the Capital Markets and Services Act 2007 ('CMSA') identifies the purpose of the CMSA as an Act to regulate capital markets.

(iv) Section 2 of the CMSA defines "securities" as meaning:

> (a) debentures, stocks or bonds issued or proposed to be issued by any government;
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> (b) shares in or **debentures of, a body corporate** or an unincorporated body; or
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> (c) units in a unit trust scheme or prescribed investments,
>
> and includes any right, option or interest in respect thereof;
>
> (emphasis added)

[29] What is important, according to learned counsel for the second and third defendants is that the definition of "debenture" under the CMSA expressly excludes loan agreements executed between parties where the lender is in the business of lending. A commercial bilateral lending such as in the present case is thus clearly excluded. For ease of reference, the definition of "debenture" under the CMSA is set out below:

> 'debenture' includes debenture stock, bonds, notes and any other evidence of indebtedness of a corporation for borrowed monies, whether or not constituting a charge on the assets of the corporation, but shall not be construed as applying to any of the following:
>
> ...
>
> (e) any agreement for a loan where the lender and borrower are signatories to the agreement and where the lending of money is in the ordinary course of business of the lender, and any promissory note issued under the terms of such an agreement; or ...

[30] The resultant compendious reading of the definitions of "debentures" and "securities" under the CA 2016 and the CMSA clearly contemplates debentures for the purposes of the CA 2016 (unless the context otherwise requires) to be financial instruments akin to bonds and excludes debentures creating security for loans in the context of commercial lending such as the debenture executed between the first plaintiff and the first defendant on which the plaintiffs' *locus standi* to mount this action is premised. In as much as the definition of "debentures" in the CA 2016 is inclusionary, it does not include debentures creating security for loans by reason of its exclusion under the definition of "debentures" in the CMSA.

[31] It is a well-established principle of statutory interpretation of *noscitur a sociis* that "where two or more words which are susceptible of analogous meaning are coupled together in a statutory provision, they are understood to be used in their cognate sense. They take as it were, their colour from each other, the meaning of the more general being restricted to a sense analogous to that of the less general" (see: *NV Alliance Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2012] 2 CLJ 211; [2012] 1 MLJ 441 at para. [15]. Thus, by reason of the formulation of "and any other securities" used in the definition of "debenture" aforesaid, "debenture stocks, bonds, sukuk and notes" inform the scope and character of "securities" as being in the nature of financial instruments for corporate fundraising.

[32] The definitions set out in s. 2 of the CA 2016 are prefaced by the words "unless the context otherwise requires". There is nothing in s. 346 which requires or suggests that the definitions of "debenture" and "securities" in the said s. 2 should not apply to s. 346 and that "debenture holder" ought to enjoy the wider meaning propounded by the plaintiffs. Rather, the purpose and historical premise of s. 346 point otherwise.

[33] Learned counsel for the plaintiffs on the other hand submitted that the word 'debenture' is featured in many provisions in the CA 2016. There are some provisions that clearly suggest that 'debenture' refers to a debenture creating a security for a loan and not a debt instrument that is tradeable as provided for in the CMSA. In particular, learned counsel for the plaintiffs referred to ss. 374, 375, 379, 384, 385, 386, 388, 392, 408, 527, 592 of the CA 2016 which in reference to 'debenture' obviously includes a debenture creating security for a loan as in the debenture that is currently registered in the name of the first plaintiff.

[34] Further, according to learned counsel for the plaintiffs, the exclusion (d) in the definition of 'debenture' in the CMSA merely refers to an 'agreement for a loan' which a debenture creating a security is not.

[35] Accordingly, learned counsel for the plaintiffs contended that the words 'debenture holder' in s. 346 of the CA 2016 must necessarily include and/or is wide enough to include someone like the first plaintiff who is a holder of a debenture created as a security for the loans that were extended by the plaintiffs to the first defendant.

[36] Having evaluated the conflicting contentions and taking into consideration the historical context and the purpose of the section, I am of the opinion that the position taken by learned counsel for the second and third defendants reflects the correct interpretation to be given to the word 'debenture holder' in s. 346.

[37] In my judgment, in construing the meaning of the word 'debenture holder' in s. 346, this court must confine itself to the meaning as expressed and defined in s. 2 of the CA 2016. I agree with learned counsel for the second and third defendants that resultant compendious reading of the definitions of "debentures" and "securities" under the CA 2016 and the CMSA clearly shows that 'debenture' for the purposes of the CA 2016 (unless the context otherwise requires) mean debt or financial instruments issued for fundraising or arising from instruments or transaction effected in the money market. In fact, the entire Subdivision 10 of Part III, Division 1 of the CA 2016 dealing with 'debentures' refers to the debentures as debt instruments that are issued by the company and offered to the public for subscriptions.

[38] That this is so is further evidence from s. 346(2)(c) of the CA 2016 which provides that the court, on an application made under s. 346, may in making an order with the view to bringing to an end or remedying the matters complained of, provide for the purchase of the debentures of the company by other debenture holders of the company or by the company itself. Such an order would not be possible in respect of a debenture creating security type that is canvassed by learned counsel for the plaintiffs.

[39] As regards the various provisions in the CA 2016 referred to by learned counsel for the plaintiffs, namely, ss. 374, 375, 379, 384, 385, 386, 388, 392, 408, 527, 592 of the CA 2016, I hold that the context of these provisions require that a different meaning is to be ascribed to the word 'debenture' in those instances. Indeed, these provisions are arranged in the CA 2016 under Division 7 for 'charges, arrangement and reconstructions and receivership'. Clearly, these provisions are dealing with a different kind of charge. In fact, s. 352(6)(a) of the CA 2016 expressly provides that the requirement for registration of such a charge shall not apply 'to a charge created to secure payment or performance of a financial obligation arising from any instruments or transactions effected in the money market and to such extent as may be specified by the Central Bank of Malaysia under the Financial Services Act 2013 or the Islamic Financial Services Act 2013'.

[40] In this connection, I am guided by the following passages in the Federal Court case of *Tan Sri Eric Chia Eng Hock v. PP* [2007] 1 CLJ 565; [2007] 2 MLJ 101 at p. 583 (CLJ); p. 118 (MLJ):

> At this stage it is pertinent to refer to *Courtauld v. Legh* [1869] LR 4 Ex 126 where Cleasby B said that it is a sound rule of construction to give

the same meaning to the same words occurring in different parts of an Act of Parliament. However, as *Craies on Statute Law* (7th Edn) says at p. 169:

> The presumption that the same words are used in the same meaning is however very slight and it is proper, 'if sufficient reason can be assigned, to construe a word in one part of an Act in a different sense from that which it bears in another part of an Act' (per Turner LJ in *Re National Savings Bank* [1866] LR 1 Ch App 547, 550).

The presumption that a word has been used consistently will more readily be abandoned if the context in which it appears in one place in an Act compels some other than the ordinary meaning to be placed upon it ...

[41] As regards the exclusion (d) in the definition of 'debenture' in the CMSA which refers to an 'agreement for a loan', I respectfully disagree with learned counsel for the plaintiff that this does not refer to debentures. The CMSA defines 'debenture' to include 'debenture stock, bonds, notes and any other evidence of indebtedness of a corporation for borrowed monies, whether or not constituting a charge on the assets of the corporation ...'. This definition echoes the common law definition of a debenture as an instrument which creates or acknowledge an obligation to pay a sum of money that may or may not be secured on property of the company (see *Handevel Pty Ltd v. Comptroller of Stamps (Vic)* [1985] 157 CLR 177; and *Ford's Principles of Corporations Law*, 15th edn, pp. 1127 to 1128).

[42] As the definition of 'debenture' would include 'any agreement for a loan where the lender and borrower are signatories to the agreement and where the lending of money is in the ordinary course of business of the lender, and any promissory note issued under the terms of such an agreement', such category of commercial loans is expressly excluded from the definition of 'debenture' for the purposes of the CMSA.

[43] Indeed, if this court were to find that the plaintiffs have the *locus standi* to commence an action under s. 346, it would open the floodgates for banks or lenders who have obtained debentures as a form of security (in the sense that of a debenture document creating a charge over assets in respect of commercial loans) to mount an action under s. 346 to recover the outstanding debts from the shareholders and/or directors of the subject company personally when faced with perceived difficulties or the possibility of a shortfall in the recovery of their loans. This will open the floodgate to permit creditors of the company to file oppression actions as a means of recovering their debts.

[44] The aforesaid interpretation based on the express definition stipulated in the CA 2016 is also consistent with the legislative purpose of s. 346 based on the parliamentary debates both in the Lower and the Upper Houses.

[45] Accordingly, I hold that the plaintiffs are not 'debenture holders' under s. 346 of the CA 2016 and thus have no *locus standi* to make an application under the said section.

Can Section 346 Apply Where There Is Only One Debenture Holder?

[46] Notwithstanding the aforesaid, and assuming that I am wrong and that the plaintiffs are 'debenture holders' under the section, the next issue for consideration is whether the said section applies in a case where there is only one debenture holder. This is the second point raised by learned counsel for the defendants challenging the plaintiffs' *locus standi*.

[47] In respect of this second point, learned counsel for the first defendant submitted that the language of s. 346 suggests that there need to be more than one debenture holder before a complaint can be raised by a debenture holder that its interests have been oppressed. According to learned counsel for the defendants, this is clear from the plural form of "debenture holders", and the words "one or more of ... the debenture holders" and "including himself" in sub-ss. 346(1)(a) and (b). For ease of reference, s. 346(1) is set out below:

> 346(1) Any member or debenture holder of a company may apply to the Court for an order under this section on the ground:
>
> (a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to **one or more of the** members or **debenture holders including himself** or in disregard of **his or their interests as** members, shareholders or **debenture holders** of the company; or
>
> (b) that some act of the company has been done or is threatened or that some resolution of the members, debenture holders or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to **one or more of the members or debenture holders, including himself**.
>
> (emphasis added)

[48] It is further contended that the possible relief contemplated under s. 346(2)(c) also lends support in that it contemplates a purchase of the debentures by other debenture holders. Section 346(2)(c) is expressed as follows:

> 346(2)(c) [the order may] provide for the purchase of the shares or debentures of the company by **other members or debenture holders of the company** or by the company itself.
>
> (emphasis added)

[49] Learned counsel for the defendants urged this court to adopt a purposive approach to the interpretation of s. 346 of the CA 2016 to give effect to the purpose of the section. More specifically, reference was made to s. 17A of the Interpretation Acts 1948 and 1967 which stipulates:

17A. In the interpretation of a provision of an Act, a construction that promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[50] On s. 17A of the Interpretation Acts 1948 and 1967, the Federal Court in *Kesatuan Pekerja-pekerja Bukan Eksekutif Maybank Bhd v. Kesatuan Kebangsaan Pekerja-pekerja Bank & Anor* [2017] 4 CLJ 265; [2018] 2 MLJ 590, held:

[62] We pause here to state that literal interpretation per se is not the only applicable rule to interpret statutes. Section 17A of the Interpretation Acts 1948 and 1967 (Act 388) for example provides that: ...

[63] This court, in *Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd & Another Appeal* [2004] 2 CLJ 265; [2005] 3 MLJ 97 had stated:

When construing a taxing or other statute, the sole function of the court is to discover the true intention of Parliament. In that process, the court is under a duty to adopt an approach that produces neither injustice nor absurdity: in other words, an approach that promotes the purpose or object underlying the particular statute *albeit* that such purpose or object is not expressly set out therein.

[51] The Court of Appeal in *Syed Mubarak Syed Ahmad v. Majlis Peguam Negara* [2000] 3 CLJ 659; [2000] 4 MLJ 167, held:

Now, it is true that a literal interpretation of s. 30(1)(c) would produce the meaning contended for by the appellant. But if you look at the decisions of our courts over the past few years, you will notice that we no longer resort to the literal rule when interpreting statutes. We will not use it when it will produce an absurd result. Neither will we use it if it does not advance the aim or object of a statute. Indeed, parliament has noticed the change in our attitude and given express effect to it in s. 17A of the Interpretation Acts 1948 and 1967.

[52] In *TPC v. ABU & Anor* [1983] 1 LNS 15; [1983] 2 MLJ 79, Edgar Joseph JR J) followed the dictum of Lord Reid in *Gill v. Donald Humberstone & Co, Ltd* [1963] 1 WLR 929 at 934:

If the language is capable of more than one interpretation, we ought to discard the more natural meaning if it leads to an unreasonable result, and adopt that interpretation which leads to a reasonably practicable result.

[53] Learned counsel for the defendants therefore contended that since the purpose of the s. 346 of the CA 2016 is to protect only the minority in a body of debenture holders, the section must be read restrictively to mean that a debenture holder must be a member of a class of debenture holders in the company just as the section applies to protect a person who is a member of a class of shareholders. It does not include a person who is a sole debenture holder of the company as in the case of the plaintiff in this instant.

[54] Learned counsel for the plaintiffs insisted that s. 346 is wide enough to permit a single debenture holder to complain of oppression. Learned counsel for the plaintiffs contended that s. 346(1) contains two separate limbs. The requirement that there must be a class of members of debenture holders is provided for under sub-s. (b) of s. 346(1). This is where there is some act of the company or some resolution by the members or debenture holders or any class of them which unfairly discriminates against or is otherwise prejudicial to one or more of the members or debenture holders, including the complainant. Learned counsel for the plaintiffs contended that the requirement for a class of members or debenture holders is not necessary under the sub-s. (a) limb. According to learned counsel for the plaintiffs, the sub-s. (a) is wide enough to cover a sole debenture holder as there is no reference to a requirement for a class of debenture holders.

[55] Learned counsel for the plaintiffs also contended that a requirement for a class will be correct if sub-ss. (a) and (b) are worded as follows:

> (a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of a class of members or debenture holders including himself or in disregard of his or their interests as members, shareholders or debenture holders of the company; or
>
> (b) that some act of the company has been done or is threatened or that some resolution of the class of members or debenture holders or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the class of members or debenture holders, including himself.

[56] With respect, I do not agree.

[57] In both sub-ss. (a) and (b) of s. 346(1) of the CA 2016, there is an express reference of the alleged oppressive acts to 'one or more' of the debenture holders, including the complainant. The sub-sections also use the plural forms for 'members', 'debenture holders' and 'shareholders', no doubt as a reference to the class from which the 'one or more' is but a sub-class. In my mind, these words taken together suggest the requirement of an existing body or class of more than one members, shareholders or debenture holders.

[58] The object of the oppression provision in s. 346 of the CA 2016 is to address fraud on the minority or some commercial unfairness being perpetrated by the majority shareholders or debenture holders on the minority shareholders or debenture holders. It is premised upon a legitimate expectation by the shareholder or debenture holder that he will not be treated unfairly in comparison with others in the same position in the company as him. It is a personal remedies as opposed to a class remedy. Further, s. 346(2)(c) expressly provides for the purchase of the shares or debentures of the company by other members or debenture holders of the company as

a possible remedy that the court may order with the view to bringing to an end the matters complained of. This again suggests the assumption of a class of more than one member.

[59] If a sole shareholder or a sole debenture holder can constitute a class and is capable of mounting a claim for oppression, it will mean that the court will have to consider an allegation that some commercial unfairness has been perpetrated upon the sole shareholder or sole debenture in favour of another class of stakeholders, for example, a class of debenture holders being adversely impacted by the alleged oppressive act to the benefit of the class of shareholders or the company.

[60] This will entail the court to embark on an evaluation of the impact of the alleged oppressive conduct or action on one class with another class with possible and inherently conflicting interests. An action by the company which serves the interest of the class of shareholders may adversely affect the interest of the class of debenture holders. For example, the shareholders may welcome the action by the company to take some risks to supply goods to a customer of questionable credit at an extremely high price which the class of debenture holders may see as prejudicial to their interests as it may impact the ability of the company to meet the payment obligations to them. It is not reasonable nor possible to determine whether there is an oppression against a member by comparing him to a holder of debenture as their rights and obligations are completely different. A shareholder is a joint owner of the company whereas the debenture holder is a creditor of the company.

[61] If it is possible for the class of debenture holders to make a claim for oppressive conduct in such a case, it will impose severe and crippling constraints to the company as it would have to balance the heterogeneous interests between different stakeholders of the company and expose the company to unnecessary risk of litigations.

[62] Given the purpose of s. 346 is to give remedy to minority interests, the wider meaning propounded by the plaintiffs is not in accordance with the legislative purpose of s. 346 for the following reasons:

(i) The first plaintiff is the sole debenture holder of the first defendant. It is not a minority. There is no room for the first plaintiff to assert that it has been oppressed.

(ii) The first plaintiff has a myriad of contractual remedies under cls. 9 and 10 of the debenture which it could enforce for purposes of recovering the alleged debt due and owing from the first defendant.

[63] I also agree with learned counsel for the defendants that the Canadian case of *BCE Inc v. 1976 Debentureholders* [2009] SCC 69, [2008] 3 SCR 560 is of no utility or assistance to the plaintiffs for the following reasons:

(i) The equipollent oppression provision housed under s. 241 of the Canada Business Corporations Act 1985 ('CBCA') is not in *pari materia* with our s. 346. For ease of reference, s. 241 of the CBCA provides as follows:

> 241. (1) A complainant may apply to a court for an order under this section.
>
> (2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates:
>
> (a) any act or omission of the corporation or any of its affiliates effects a result,
>
> (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
>
> (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

(ii) Section 238 of the CBCA defines "complainant" for the purposes of s. 241 as follows:

> 238. In this Part ...
>
> complainant means
>
> (a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
>
> (b) a director or an officer or a former director or officer of a corporation or any of its affiliates,
>
> (c) the Director, or
>
> (d) any other person who, in the discretion of a court, is a proper person to make an application under this Part.

(iii) As is apparent from the language of s. 238 of the CBCA as set out above, the said section is cast in wider terms than our s. 346 of the CA 2016 as regards who may be a complainant and expressly includes a beneficial owner or former beneficial owner of a security in the subject company.

(iv) In contrast, our s. 346 caters only for two categories of complainants, namely a member or a debenture holder.

[64] Accordingly, I also hold that the first plaintiff lacks the *locus standi* to invoke s. 346 of the CA 2016 by reason of the fact that the first plaintiff is the sole debenture holder of the first defendant. Section 346 of the CA 2016 is applicable only where a minority within a class has been oppressed by the majority of that class or where the powers of the directors are being exercised in a manner that is oppressive to the minority of the said class.

Second Plaintiff's *Locus Standi*

[65] There is also the question whether the second plaintiff who is the beneficiary of the debenture has the requisite *locus standi* to commence this action.

[66] In my judgment, I hold that the second plaintiff does not qualify as a complainant under s. 346. In the context of actions brought under s. 346 by persons who claim to have beneficial interest in the shares of a company through a registered member, by reference to the express language of s. 181 of the now repealed CA 1965 (the precursor to the present s. 346), the courts have held that such persons lack the requisite *locus standi* to bring an action under the section. (See *Yushiro Chemical Industry Co Ltd & Ors v. Jet-Tech Materials Sdn Bhd & Ors and Another Appeal* [2013] 5 CLJ 790 at paras. [36], [37] and [38]; *Jet-Tech Materials Sdn Bhd & Anor v. Yushiro Chemical Industry Co Ltd & Ors And Another Appeal* [2013] 2 CLJ 277; [2013] 2 MLJ 297 at para. [20] and *Yeng Hing Enterprise Sdn Bhd v. Liow Su Fah* [1979] 1 LNS 130; [1979] 2 MLJ 240 at pp. 243H-244A]

[67] The first plaintiff is the sole named counter-party to the debenture. The second plaintiff is, by its own admission merely a beneficiary of the debenture. The plaintiffs' reliance on *Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor* [1996] 4 CLJ 716; [1996] 1 MLJ 113 as authority that a beneficial owner of shares can file for oppression under s. 346 with respect, is misplaced.

[68] It is true that it is not an absolute rule that a person having the beneficial interest in the share of a company can never bring an action for oppression under s. 346 of the CA 2016. In *Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor* (*supra*), the Federal Court when construing s. 181 of the CA 1965 held that the requirement that a petitioner must be a 'member' is a general and not a universal rule. There might be exceptional situations where the application of the general rule will be unfair or unjust. At pp. 741-742 (CLJ); pp. 133-134 (MLJ), the Federal Court held:

> We next turn to consider the category of persons within a company who may invoke the provisions of s. 181 of the Act. It is an obvious and simple point on which comment would ordinary have been unnecessary. But we are compelled to deal with this issue because it is one of the points relied upon by the judge for striking out the appellant's petition.
>
> Section 181 opens with the words: "Any member'. There then follows a recital of the other persons who are declared to be entitled to move the court under the section. The expression 'member' is not defined in s. 4 of the Act. However, the meaning of that term is to be found in s. 16(6) of the Act which provides as follows:
>
> > (6) The subscribers to the memorandum shall be deemed to have agreed to become members of the company and on the incorporation of the company shall be entered as members in its

> register of members, and every other person who agrees to become a member of a company and whose name is entered in its register of members shall be a member of the company.
>
> ... The result, therefore, is that as a general rule, only one who comes within the terms of s. 16(6) of the Act may present a petition under s. 181, Put it another way, in general, a petitioner who applies under the section must be able to demonstrate that his name appears on a company's register of members at the date of presentation of the petition: if he is unable to do so, then he has no standing to invoke the jurisdiction conferred upon the court by this section ...
>
> We, have, in stating the applicable rule as to standing under s. 181, taken great care in emphasising that what has been expressed is the general rule and not a universal rule. We have done so to bring home the point that there may be cases where an application of the general rule would be unfair or unjust.
>
> Take, for instance, the case of a person who has agreed to become a member, but whose name has been omitted from the register of members. If it transpires that prior to the dispute leading to the presentation of the petition, a company or its board had always treated the complainant as a member, it would not be open to them to assert that the petitioner lacked *locus standi*. Examples may be multiplied without any principle emerging from them. Take the facts of this very case. Here, we have a fact pattern where the appellant's membership of the company had been terminated in circumstances which are being challenged by him on substantial grounds. The substantial ground he complains of is the deprivation of his membership in the company. He says that the circumstances attending this deprivation of membership falls within the framework of s. 181(1)(a) and (b). It is the company, acting through its board that had deprived the appellant of the status of a member. Can the company be now heard to say that the appellant is no longer a member and is therefore disentitled from moving the court under s. 181 of the Act and from questioning that very deprivation in proceedings brought under the section? We think not. For it does not lie in the mouth of the alleged wrongdoers to say that the appellant has no ground to stand on after having cut the very ground from under his feet.

[69] The exception to the general rule (namely, that only registered members of the subject company would have the requisite *locus standi*) contemplated by the Federal Court in *Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor* (*supra*), is premised upon the doctrine of estoppel. The exception would apply only if an application of the general rule would be unfair or unjust. For instance, where the wrongdoer has omitted to register the complainant in the company's register of members, the wrongdoer cannot be heard to say that the complainant has no *locus standi* after having "cut the very ground from under his feet". Ultimately, it is a question of fairness.

[70] In the present case, mere knowledge that the second plaintiff is the beneficiary of the debenture is insufficient to give rise to an estoppel for the simple reason that the interests of the first and second plaintiffs are aligned.

The first plaintiff as the registered debenture holder, is already seeking to enforce its rights (which is aligned with the second plaintiff) under the debenture. The application of the general rule does not prejudice the second plaintiff's rights and is neither unfair nor unjust.

The Complaints Are Corporate Wrongs And Not Actionable Under Section 346

[71] Notwithstanding that I have ruled that s. 346 of CA 2016 is not available to the plaintiffs in this case, I will nevertheless now proceed to consider if the plaintiffs have made out a case for oppression under the said section as learned counsel have made extensive submissions on these points and there are some interesting and important legal issues that have been canvassed.

[72] Learned counsel for the plaintiffs placed much weight on the expert report of Roderick John Sutton dated 22 August 2019 ('the expert report') who was appointed by the plaintiffs to prepare an independent report in relation to the financial affairs of the first defendant insofar as it relates to its business operations with Megasteel *vis-à-vis* the offtake agreement.

[73] According to the expert report, the first defendant's accounts receivable from Megasteel started accumulating in the 2008 financial year. The first defendant's management and its auditors started impairing its accounts receivable from Megasteel in June 2012 and during the period from 2012 to 2017, Megasteel had not paid the first defendant at all in respect of the products purchased from the first defendant. During this period, the first defendant had continued to drawdown and kept trading with Megasteel notwithstanding that the first defendant would not be able to collect any of its receivables from Megasteel.

[74] The aforesaid action led to the deterioration of the quality of the plaintiffs' security held under the debenture. No action had been taken by the first defendant to recover the losses from any of the directors of the company. Premise upon the aforesaid, learned counsel for the plaintiffs contended that the affairs of the first defendant are being conducted or the powers of the directors are being exercised in a manner oppressive to the plaintiffs or in disregard of the plaintiffs' interest.

[75] According to the defendants, the claim brought under s. 346 of CA 2016 by the plaintiffs are flawed because the complaints are corporate claims actionable by first defendant only. This, of course is premised upon the rule famously laid down by Sir James Wigram VC in *Foss v. Harbottle* [1843] 2 Hare 461 where, subject to certain exceptions, only the company itself can sue for a wrong done to it.

[76] The crux of the defendants' submission is the principle that under s. 346, there must be damage to the personal interests of the shareholder or debenture holders due to mismanagement. Indeed, the very wording of the

section suggests that this is so, when it talks of disregard of or prejudice to members' or debenture holders' interests (see *Kang Choon Leu v. Wintoni Group Bhd & Ors* [2016] 1 LNS 611. It is not appropriate to seek remedy under s. 346 for a corporate injury. In respect of such corporate injury, the proper remedy is under s. 347 of the CA 2016 *vide* derivative actions. Section 347 provides:

> 347(1). A complainant may, with the leave of the Court initiate, intervene in or defend a proceeding on behalf of the company.

The said section is wide enough to admit a debenture holder to initiate a claim against the company. The word 'complainant' is not defined and in its ordinary and natural meaning in the Cambridge English Dictionary is 'a person who makes a formal complaint in a law court'.

[77] The fundamental difference is that oppression proceedings under s. 346 are available to a shareholder and a debenture holder to bring mismanagement to an end and derivative actions under s. 347 or under the common law as preserved by s. 347(3) provides a remedy to a complainant to seek remedy on behalf of the company for misconduct in the nature of corporate wrongs.

[78] Notwithstanding the aforesaid, it is contended by learned counsel for the plaintiffs that the court has wide powers under s. 346 and such powers include making an order that the wrongdoers make payments to the plaintiffs for their losses.

[79] Section 346(2) of the CA 2016 stipulates:

> (2) If on such application the Court is of the opinion that either of those grounds is established, the Court may make such order as the Court thinks fit with the view to bringing to an end or remedying the matters complained of, and without prejudice to the generality of subsection (1), the order may:
>
> (a) direct or prohibit any act or cancel or vary any transaction or resolution;
>
> (b) regulate the conduct of the affairs of the company in the future;
>
> (c) provide for the purchase of the shares or debentures of the company by other members or debenture holders of the company or by the company itself;
>
> (d) in the case of a purchase of shares by the company, provide for a reduction accordingly of capital of the company; or
>
> (e) provide that the company be wound up.

[80] According to learned counsel for the plaintiffs, the aforesaid section is without any ambiguity. It permits the court to make such orders as the court deems fit to bringing to an end or to remedying the matters complained of. It is stated in the widest of terms and would necessarily include the power to make any order of damages or compensation to be paid to the plaintiffs.

[81] In *Re A Company* (No. 005287 of 1985) [1986] 1 WLR 281, the company was a family company where the shares were held by members of the family. One of them, H, acquired a controlling interest and, according to the other shareholders, had conducted the affairs of the company in a manner unfairly prejudicial to their interests. It was alleged that H had made, or had caused to be made, various payments of the company's money to himself without authority and in breach of his duty to the company. A s. 459 of the UK Companies Act 1985 petition was filed. The relief sought included an order that H repay to the company the payments that had been made to him without authority. Hoffmann J (as he then was) referred to s. 461(1) under which the court if satisfied that the petition is well founded, may make 'such order as he thinks fit for giving relief in respect of the matters complained of' and commented that: 'those words appear to give the widest possible discretion'.

[82] On the point that the petitioners should have commence a derivative action in the company's name to seek the repayment of the company's money, Hoffmann J said:

> Looking at the matter from a practical point of view that does not seem to me to be very convenient. It would mean separate proceedings having to be commenced by writ and separate pleadings delivered in respect of matters which substantially overlap.

[83] With respect, there is a distinction between a wrong done to the company and a wrong done to the minority shareholder. In the case of the former, it is a fraud on the company and the proper party to sue is the company and where the company is unwilling to bring an action, a member of the minority can bring such an action on behalf of the company by way of derivative action. In the case of the latter, the member of the minority can bring an action in his own right as the fraud is on him personally.

[84] It is accepted that factual circumstances may give rise to an overlap between the oppression remedy and the derivative action. Lord Millet sitting in the Court of Final Appeal in Hong Kong in *Waddington Ltd v. Chan Chun Hoo Thomas & Ors* [2009] 4 HKC 381, (also following *Nina Kung v. Tan Man Kou* (*Re Chime Corporation Ltd)* [2004] 7 HKCFAR 546) explained at para. [77]:

> But while there is some overlap between such proceedings and the derivative action they serve essentially different functions. Unfair prejudice proceedings are concerned to bring mismanagement to an end; derivative actions are concerned to provide a remedy for misconduct: see *Re Charnley Davies Ltd (No 2)* [1990] BCLC 760; *Re Chime Corp Ltd* (2004) 7 HKCFAR 546. While the court may have jurisdiction in the strict sense on a petition under s. 168A to order payment of compensation to the company, the derivative action is the proper vehicle for obtaining such relief where the plaintiff's complaint is of misconduct rather than mismanagement: see *Re Chime Corp Ltd* (2004) 7 HKCFAR 546 at 571.

[85] However, complaints involving mismanagement (wrong against the shareholder) may also include elements of misconduct (wrong against at the company). As an illustration, a wrongful exercise of powers by the directors may also be a breach of the directors' fiduciary duties to the company. This was why in *Waddington Ltd v. Chan* (*supra*), Lord Millet held the 'gist of the complaint' test which looks at not only the nature of the complaints but also the remedy sought to determine if there is any abuse in the filing of the oppression action instead of a derivative action.

[86] Lord Millet sitting in the Court of Final Appeal in Hong Kong in *Waddington Ltd v. Chan Chun Hoo Thomas & Ors* [2009] 4 HKC 381, (following *Nina Kung v. Tan Man Kou* (*Re Chime Corporation Ltd*) [2004] 7 HKCFAR 546 explained at para. [77]:

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>
> (emphasis added)

[87] In *Re Chime Corporation Ltd* [2004] HKCU 1453, the Hong Kong Court of Final Appeal was dealing with the question whether there is jurisdiction to make, on an unfair prejudice petition presented by a shareholder, an order for the payment of damages or compensation, or for the grant of restitution, to the company itself. In determining the question, the Court of Appeal addressed the inter-relationship between unfair prejudice petition and derivative action. At para. 14 of the judgment, the Court of Appeal stated thus:

> Hoffmann J's decision in *Re A Company* (No. 005287 of 1985) was discussed by Millet J (as Lorde Millet then was) in *Re Charnley Davies Ltd (No. 2)* [1990] BCLC 760, a case of a petition presented under s. 27 if the Insolvency Act 1986. As one sees at pp 783i - 784a, Millett J shared Hoffmann J's view that the availability of a derivative action did not bar s. 459 relief, but added this (at p. 784a-b):
>
> > The very same facts may well found either a derivative action or a s. 459 petition. But that should not disguise the fact that the nature of the complaint and the appropriate relief is different in the two cases. *Had the petitioners' true complaint been of the unlawfulness of the respondent's conduct, so that it would be met by an order for restitution, then a derivative action would have been appropriate and a s. 459 petition would not*.
> >
> > (emphasis added)

[88] Our High Court in *Kang Choon Leu v. Wintoni Group Bhd & Ors* [2016] 1 LNS 611, has adopted Millet J's approach at paras [24], [25] and [36] of the judgment where the learned judge held:

> [24] It ought to be fully appreciated that the oppression remedy under s. 181 and the derivative action under s. 181A are statutory remedies enacted to provide minority shareholders with safeguards against decisions and conduct of majority shareholders or those in control of the company. *The distinction cannot be expressed more clearly than stating that the former allows the minority to sue on its own behalf, whilst the latter permits a complainant to sue on behalf of the company for a wrong done to the company …*
>
> [25] *The oppression remedy under s. 181 …, permits a minority shareholder to institute action on his or her own behalf for the wrong that he or she suffers personally as a result of the conduct deemed oppressive. This is a personal action … .*

And at para. [36]:

> [36] ... But Millett J [in Charnley Davies Ltd (No.2)] did however in that case additionally hold that the *distinction between misconduct and unfairly prejudicial management did not lie in the particular acts of which the complaint was made but in the nature of the complaint and the remedy necessary to meet it*.
>
> (emphasis added)

[89] This threshold test was adopted by our Federal Court in *Koh Jui Hiong & Ors v. Ki Tak Sang & Another Appeal* [2014] 2 CLJ 401; [2014] 3 MLJ 10 following *Re Chime Corporation (supra*):

> [54] Walter Woon on *Company Law* at para 5.82 asked whether issue had been raised to the 'extent to which s. 216 of the Singapore Companies Act may be used to outflank the rule in *Foss v. Harbottle* and its statutory analogue s. 216A'. In point of fact, that was answered by the Singapore Court of Appeal in *Kumagai Gumi Co Ltd v. Zenecon Pte Ltd & Ors And Other Appeals* [1995] 2 SLR 297:
>
> > In our opinion, there is a limitation on the order which the court can make under s. 216. The order to be made must be made 'with a view to bringing an end or remedying the matters complained of' and we agree that 'the matters complained of' mean matters rightly complained of. Nevertheless, subject to this limitation, the jurisdiction to make an order under that section is very wide. Much depends on the matters complained of and the circumstances prevailing at the time of hearing.
>
> [55] **There is a limit to the extent to which s. 181 could be used to outflank the rule in *Foss v. Harbottle***. The order to be made must be made with a view to bringing an end or remedying the matters complained of under s. 181. The derivative action elements should be an incident of the matters complained of under s. 181. **It would be an abuse of s. 346 where the nature of the complaint was misconduct rather than mismanagement** (see *Re Chime Corporation* per Lord Scott). 'To allow corporate claims to be pursued *via* the oppression remedy would effectively denude the statutory

A derivative action of much of its intended effect' (*A Reconsideration of the Shareholder's Remedy for Oppression in Singapore* by Pearlie M C Koh, CLWR 42 1(61) 1 March 2013).

(emphasis added)

B **[90]** Hence, the authorities suggest that the correct approach in determining whether the claim is a personal claim of oppressive conduct or a corporate claim, one must look at the 'gist' of the complaint in the nature of the complaint and the appropriate remedy necessary to meet it as was stated in *Re Charnley Davies Ltd (No 2)* [1990] BCLC 760.

C **[91]** In *Re Charnley Davies Ltd (No 2)* [1990] BCLC 760, Millett J (as he then was) articulated the distinction between unlawful conduct and conduct that is unfairly prejudicial to the petitioner's interest at p. 783 of the judgment as follows:

D An allegation that the acts complained of are unlawful or infringe the petitioner's legal rights is not a necessary averment in a s. 27 petition. In my judgment it is not a sufficient averment either. The petitioner must allege and prove that they are evidence or instances of the management of the company's affairs by the administrator in a manner which is unfairly prejudicial to the petitioner's interests. Unlawful conduct may be relied on for this purpose, and its unlawfulness may have a significant probative E value, but it is not the essential factor on which the petitioner's cause of action depends.

[92] At p. 784, Millet J further discussed the application of this principle to the issue of distinguishing between an action for relief from oppression and a derivative action:

F The very same facts may well found either a derivative action or a s. 459 petition. But that should not disguise the fact that the nature of the complaint and the appropriate relief is different in the two cases. Had the petitioners' true complaint been of the unlawfulness of the respondent's conduct, so that it would be met by an order for restitution, then a G derivative action would have been appropriate and a s. 459 petition would not. But that was not the true nature of the petitioners' complaint. They did not rely on the unlawfulness of the respondent's conduct to found their cause of action; and they would not have been content with an order that the respondent make restitution to the company. They relied on the respondent's unlawful conduct as evidence of the manner in which he H had conducted the company's affairs for his own benefit and in disregard of their interests as minority shareholders; and they wanted to be bought out. They wanted relief from mismanagement, not a remedy for misconduct.

[93] The Federal Court in *Koh Jui Hiong* (*supra*) made it clear that s. 346 I cannot be used in a dispute when the 'gist' of the complaint is a corporate wrong which should be remedied in a derivative action. Section 346 cannot override the rule in *Foss v. Harbottle* (*supra*), that corporate wrongs can only be pursued by the company:

> [25] ... And thirdly, the damages awarded was to compensate CH for loss caused by the misconduct of the plaintiffs against CH. In my judgment the distinction between misconduct and ... (mismanagement) does not lie in the particular acts or omissions of which the complaint is made, but in the nature of the complaint and the nature of the remedy necessary to meet it ... If the whole gist of the complaint lies in the unlawfulness of the acts or omissions complained of, so that it may be adequately redressed by the remedy provided by law for the wrong, the conduct is one of misconduct *simpliciter* (*Re Charnley Davis Ltd (No 2)* [1990] BCLC 760, per Millett J). Damages were not awarded to CH for mismanagement. The damages awarded by the trial court, *albeit* reduced by the Court of Appeal, were to compensate CH for loss caused by the plaintiffs' fraudulent disposal of its 446,000 polymate shares. Damages were awarded to CH for misconduct towards it, which was actionable by CH itself, by a derivative action (see *Re Charnley Davis Ltd (No 2)* [1990] BCLC 760, where Millett J, as he then was, concluded that where the essence of the claim was not mismanagement but consisted of breaches of duty or other misconduct actionable by the company itself, the proper vehicle for relief was a derivative action; and *A R Evans Capital Partners Limited v. Gen2 Partners Inc* [2012] HKCU 1284, where Barma J held that where the claims concern misconduct, they belong to a derivative action.

[94] So what are examples of cases where claims made under s. 346 have been held to be improper?

[95] Apart from establishing the test for the nature of a s. 346 case being mismanagement as opposed to misconduct, *Koh Jui Hiong* is a case holding that improper damage to the assets of a company (through improper disposal or misappropriation) was held not to be mismanagement. Similar views were held in the following cases:

(i) In *Wintoni* (*supra*) at para, [21] it was held that allegations of an improper sale of company assets must be remedied through a derivative action.

(ii) In *Rea v. Wildeboer* [2015] OJ No. 2651 at para 27, claims of misappropriation of funds from a company, could not be prosecuted under s. 248 of the Canada Business Corporations Act 1985 (the equipollent to our s. 346) and were struck out.

(iii) In *A R Evans Capital Partners Limited v. Gen2 Partners Inc* [2012] HKCU 1284 at para. [75] claims for breach of fiduciary and director's duties, for breach of trust, and for money had and received or diversion of corporate opportunities were claims for misconduct against the company, which could not be advanced under oppression proceedings, but in derivative actions.

(iv) In *Re Shun Tak Holdings Ltd* [2009] 6 HKC 364, the court struck out an oppression petition whose true nature was a claim against the directors

for failing to prosecute a claim for unpaid dividends, an asset of the company. At para. [35], Kwan J once again confirmed the need to look at the nature of the complaint and the relief sought. He said:

> [35] Mr Shieh submitted the key to the above passages is not just to look at the nature of the complaint, as Mr. Chow had asked the court to do. It is to look at the nature of the complaint together with the relief sought. If the whole gist of the complaint is misconduct and the objective of the litigation is to seek redress for the company for the misconduct, then it is squarely a case within derivative action territory and the matter would not be within the practical jurisdiction of s. 168A, although there may be theoretical jurisdiction. I agree with this analysis.

(v) On the other side of the line, in *Re Charnley Davies Ltd (No 2)* [1990] BCLC 760 the proper procedure was s. 346 as the remedy sought was to end the mismanagement by a 'buy out'. In contrast, in *Stainer v. Lee* [2010] EWHC 1539 (Ch) at para. [52], the claim was for a pure corporate wrong and no 'buy out' remedy was asked for but the remedy was for financial remedies for misconduct and for restitution; this was correctly commenced as a derivative action.

Policy For The Distinction

[96] Learned counsel for the second and third defendants proffered the following policy reasons for the need to keep a distinction between the oppression action and derivative action culled from *Wintoni*. Such separation prevents a member from pursuing a corporate claim (under the guise of personal claim) for his own benefit while ignoring the interests and wishes of the other shareholders. Indeed, to muddy the two would also cause a conflict with established company and contract law principles.

[97] Firstly, it is a trite that a shareholder, not being a party to the transactions, would not ordinarily be allowed to sue to set aside the transaction in the absence of privity to the transaction, see para. [16] of *Wintoni*.

[98] Secondly, a shareholder has no interest in the assets of the company and cannot set aside the sale thereof:

(i) Paragraph [17] of *Wintoni*, following the Court of Appeal in *Pioneer Haven Sdn Bhd v. Ho Hup Construction Company Bhd & Anor And Other Appeals* [2012] 5 CLJ 169; [2012] 3 MLJ 616. The same was held in *Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors* [2005] 3 CLJ 355; [2005] MLJU 225 at pp. 2 and applies even if the subsidiary is a wholly-owned subsidiary as held in *Abdul Aziz Atan & Ors v. Ladang Rengo Malay Estate Sdn Bhd* [1985] 1 CLJ 255; [1985] CLJ (Rep) 370; [1985] 2 MLJ 165 at p. 168 and the Supreme Court in *Yap Sing Hock & Anor v. PP* [1992] 4 CLJ 1950; [1992] 1 CLJ (Rep) 356; [1992] 2 MLJ 714.

(ii) a shareholder's personal claim against directors for causing a company to breach s. 132C of the CA 1965 is not maintainable. This is clear from the decision of the Court of Appeal in *Pioneer Haven* (*supra*). The Court of Appeal remarked at para. [118] that s. 132C was enacted to protect the company's interests and not that of its shareholders. The Court of Appeal in *Pioneer Haven* held:

> [177] Unlike subsection (2) of s. 132C, this subsection [s. 132C(3)] does not provide that a member of the company (Ho Hup) may void the transaction. It can therefore be construed that the Legislature did not intend to provide an individual member i.e. a shareholder such as Ho Hup, with the power to invalidate a transaction entered into by a company. This is in keeping with authorities such as *Law Kam Loy v. Boltex* (*supra*) which draws a clear distinction that a shareholder has no legal or equitable right to an asset of a company.

[99] Thirdly, the proper plaintiff rule means that as first defendant is the sole owner of its assets, only the first defendant can complain for any damage to such assets see the Federal Court in *Koh Jui Hiong* (*supra*); the Court of Appeal in *Abdul Rahim Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 4 CLJ 551; [1995] 3 MLJ 417, the House of Lords in *Johnson v. Gore Wood & Company* [2001] 1 All ER 481 at p. 528b per Lord Millet and at p. 503c per Lord Bingham, followed at paras. [29] and [30] of *Wintoni*.

[100] The aforesaid three reasons are really the underlying basis requiring shareholders to bring derivative actions where a wrong was done to the company as the cause of action is vested in the company and the company alone can sue. Hence, where the wrongdoers are in control of the company, the procedural device of a derivative action provided under s. 347 of the CA 2016 affords protection to the minority. There is however a threshold requirement which is provided essentially as a filter to prevent frivolous and abusive actions not in the interests of the company to bring. There is no such safeguard in a s. 346 claims. Hence, if a distinction is not made between a genuine oppression claim and a derivative action, a frivolous claim can be made under s. 346 to circumvent the rule in *Foss v. Harbottle* (*supra*).

[101] In other words, the separation of ss. 346 and 347 prevents a shareholder from personally recovering corporate losses under the guise of a personal claim. It also prevents side-stepping the safeguards and the screening process requiring leave, in-built into s. 347 (the leave procedure) which ensures that the derivative action commenced for a corporate wrong be prosecuted for the benefit of the company and its creditors, see *Ng Kek Wee v. Sim City Technology Ltd* [2014] 4 SLR 723.

[102] There is also the rule against double recovery. The loss suffered by the shareholder to his shares must not be merely reflective of the loss to the company. If so, the same loss could be recovered by both the company (as a corporate loss) and by the shareholder (as a personal loss). This would

amount to double recovery and is prohibited (see *Johnson v. Gore Wood & Company* [2001] 1 All ER 481, per Lord Bingham at p. 503c and per Lord Millet at p. 528b (followed by the court below at paras. [29] and [30] of the *Wintoni* (*supra*)).

[103] The reflective loss principle is a variant of the proper plaintiff rule (see *Townsing Henry George v. Jenton Overseas Investment Pte Ltd* [2007] 2 SLR(R) 597 at para. [78]). Where the shareholder's loss merely reflects the company's loss that would be made good if the company had enforced its full rights, the proper party to recover the reflective loss is the company and not the shareholder.

[104] So, where the company's loss overlaps with that of the shareholder, to prevent double recovery the shareholder's claim for his share of the loss is nevertheless excluded by the company's claim, Lord Millet continued at p. 528h:

> The position is, however, different where the company suffers loss caused by the breach of a duty owed both to the company and to the shareholder. In such a case the shareholder's loss, in so far as this is measured by the diminution in value of his shareholding or the loss of dividends, merely reflects the loss suffered by the company in respect of which the company has its own cause of action. If the shareholder is allowed to recover in respect of such loss, then either there will be double recovery at the expense of the defendant or the shareholder will recover at the expense of the company and its creditors and other shareholders. Neither course can be permitted. This is a matter of principle; there is no discretion involved. *Justice to the defendant requires the exclusion of one claim or the other; protection of the interests of the company's creditors requires that it is the company which is allowed to recover to the exclusion of the shareholder.*
>
> (emphasis added)

And at p. 532b:

> *It is of course correct that a diminution in the value of the plaintiffs shares was by definition a personal loss and not the company's loss, but that is not the point. The point is that it merely reflected the diminution of the company's assets. The test is not whether the company could have made a claim in respect of the loss in question; the question is whether, treating the company and the shareholder as one for this purpose, the shareholder's loss is franked by that of company. If so, such reflected loss is recoverable by the company and not by the shareholders.*
>
> (emphasis added)

[105] By reason of this reflective principle, even if the plaintiffs' claims overlap with that of the first defendant, it must fail. The company's claim 'franks' the plaintiffs' claims because as a matter of public policy, the company's claim cannot exist in tandem with the plaintiff's claim, as there will be double recovery. The above passages in *Johnson* were followed by our Court of Appeal in *Pioneer Haven* (*supra*) at pp. 645 to 646.

[106] The UK Supreme Court has recently in *Sevilleja v. Marex Financial Ltd* [2020] UKSC 31 made some clarifications on the principle of reflective loss. In particular, the majority decision in that case held that in determining whether the reflective loss principle is applicable, it is necessary to distinguish between cases where claims are brought by a shareholder in respect of loss which he has suffered in that capacity, in the form of a diminution in share value or in distributions, which is the consequence of loss sustained by the company, in respect of which the company has a cause of action against the same wrongdoer and cases where claims are brought, whether by a shareholder or by anyone else, in respect of loss which does not fall within that description, but where the company has a right of action in respect of substantially the same loss. In cases of the first kind, the shareholder cannot bring proceedings in respect of the company's loss since he has no legal or equitable interest in the company's assets. It is only the company which has a cause of action in respect of its loss. If the company's recovery of its loss have the effect of restoring the value of the shares, an award of damages to the company will be the only remedy provided by the law to achieve its remedial objective of compensating both the company and the shareholders. In the case where the company fails to pursue a right of action, the shareholders may take up derivative action to enforce the company's right.

[107] In respect of the second class of cases where the claims are brought by the shareholders for loss suffered in the capacity of a creditor of the company for instance, the reflective principle does not necessarily apply. In such a case, it is possible for the shareholder to pursue a separate claim against the third party in his capacity as creditor concurrently with the company.

[108] Learned counsel for the plaintiffs, in reliance on *Sevilleja v. Marex Financial Ltd* (*supra*) contended that the plaintiffs are entitled to bring this oppression action against the defendants as the plaintiffs are creditors of the first defendant and not shareholders.

[109] However, learned counsel for the second and third defendants contended that the plaintiffs can only avoid the reflective principle if they can show that their claim or loss is not separate and distinct from that of the first defendant.

[110] In our present case, the first defendant's claim against the second and third defendants would be for the losses arising from second and third defendants' breach of their fiduciary duties to the first defendant in continuing to drawdown on the facilities (thus incurring liabilities to first defendant) to manufacture the product for supply to Megasteel knowing that the first defendant would not be paid in respect of the sale. The plaintiffs' claims in this oppression action against the second and third defendants are identical to that of the first defendant, ie, for losses due to the drawdown of the facilities. Accordingly, to allow a claim by the plaintiffs for the facilities

against the second and third defendants will mean that there will be double recovery. To avoid this, the plaintiffs' claim for the facilities should lie only against the first defendant. The plaintiffs do not have a separate and distinct right of action apart from their capacity as a debenture holder of the first defendant.

[111] Finally, the distinction between an oppression action and a derivative action is also necessary to prevent a director from being vexed by a derivative action if the original s. 346 action was dismissed (see *Re Chime Corporation* (*supra*) at para [28], per Bokhary PJ).

[112] To add to the aforesaid, the Singapore Court of Appeal in *Ng Kek Wee v. Sim City Technology Ltd* [2014] 4 SLR 723 at p. 743 also held that if s. 216 of the Singapore Companies Act (our equipollent of s. 346) is permissible to be used to vindicate essentially corporate claims, s. 216(2)(c) (the Singapore provision for derivative action) would be rendered nugatory.

[113] The complaint and remedies sought by the plaintiffs are premised on the dire financial position of both the first defendant and Megasteel. The second and third defendants are alleged to have abused their positions and breached their statutory and fiduciary duties as directors of both the first defendant and Megasteel. More specifically, the plaintiffs' complaints against second and third defendants are:

(i) by failing to stop the first defendant trading with Megasteel and so running up and failing to collect the trade receivables owed by Megasteel which increased from RM25.6 million in 2008 to RM583.9 million in 2017;

(ii) by allowing the first defendant to supply the product to Megasteel, eventually running the first defendant's business into the ground;

(iii) this led to the value of the first defendant's assets and undertaking charged to the plaintiffs under the debenture being severely diminished;

(iv) by preferring Megasteel's interests over the interests of the first defendant's and the plaintiffs', the first defendant failed to make the requisite repayments on the facilities.

[114] Based on the aforesaid complaints, the remedies which the plaintiffs are seeking under prayers 2 to 5 of the OS are for the repayment of the facilities in the sum of about RM118 million. The repayment is claimed against the second and third defendants who, in ordinary circumstances, would not be personally liable for the obligations of the first defendant.

[115] In essence, the gist of the claim is that the assets of the first defendant were depleted by disposing of the first defendant's product without properly collecting the price for them. The 'gist' of the claim is for misapplication of the first defendant's assets. The claim is that these assets that were misapplied

had resulted in damage to the assets of the first defendant. Such a claim for misappropriation or misapplication of the first defendant's assets is vested in the first defendant.

[116] The plaintiffs complaints fall into two broad categories, namely (i) breaches of the facilities and/or the offtake agreement; and (ii) breaches of directors' duties by the second and third defendants by preferring Megasteel to the detriment of the first defendant.

[117] On high authority, neither of these can properly form the juridical basis for an action under s. 346 which is not the platform to redress or improve upon contractual claims. The claims for breaches of the facilities and offtake agreement are based on the underlying contractual agreements governing the relationship between the first defendant and the plaintiffs and between the first defendant and Megasteel. The rights and remedies lie in the enforcement of their respective contracts and not by way of an oppression action.

[118] In *Jet-Tech Materials Sdn Bhd & Anor v. Yushiro Chemical Industry Co Ltd & Ors And Another Appeal* [2013] 2 CLJ 277; [2013] 2 MLJ 297 at para. [37], the Federal Court held that 'breaches of a shareholders agreement cannot be a basis for bringing a petition under s. 181 (the predecessor to s. 347 of the CA 2016). A complaint under s. 181 of the CA 1965 must be confined to matters relating to the affairs of the company. Shareholders' agreement and breach of the same clearly are not matters relating to the affairs of the company'.

[119] By the same token, breaches of the contracts between the first defendant and Megasteel cannot be the basis for an oppression action as the rights and remedies of the parties lie in the enforcement of the contract.

[120] More significantly, these remedies do not give relief from the alleged mismanagement of continuing to supply the product and failing to collect the outstanding debts payable by Megasteel. The mismanagement has ceased sometime in 2016.

[121] In short, the plaintiffs' case is a clear case of misconduct *simpliciter*. The claim is nothing more than a dress up a debt recovery action as a claim for oppression. This is an abuse of the court process and for this reason the OS must fail.

The Claim Is Tactical Abuse

[122] Further, the essence of the claim is for repayment under the facilities granted to the first defendant. No guarantees for these facilities were obtained from the second and third defendants as directors. But now, the very same claim is made against the directors under the guise of oppression proceedings under s. 346.

[123] This is nothing more than a tactical move to make the second and third defendants liable for the first defendant's debts, which in essence are complaints for breach of fiduciary duties. This re-crafting of the complaint does not take the plaintiffs very far:

(i) in *Galantis v. Alexiou* [2019] 1 WLR 3636, the Privy Council deprecated such tactical manoeuvres:

> [35] Thirdly, the order may serve only to vindicate the reasonable expectations of corporate stakeholders. They may not serve a purely tactical purpose:
>
> > In particular, the complainant should not be permitted to jump the creditors' queue by seeking relief against a director personally. The scent of tactics may therefore be considered in determining whether or not it is appropriate to impose personal liability on a director under s. 241(3).' (*Wilson v. Alharayeri*, at para 54)
>
> [36] Fourthly, a court should consider the general corporate law context:
>
> > Director liability cannot be a surrogate for other forms of statutory or common law relief, particularly where such other relief may be more fitting in the circumstances (at para 55).

(ii) in *Wintoni* (*supra*) at para. [21] it was held that an allegation of an improper sale must be remedied through a derivative action; and

(iii) a corporate claim to be prosecuted by the plaintiffs for their own benefit under the guise of a mismanagement case is a practice that was wholeheartedly rejected in *Ng Kek Wee* (*supra*).

[124] Accordingly, I hold that the plaintiffs' claim is nothing more than an improper attempt to seek the recovery of their loans from the second and third defendants in circumstances where the first defendant is no longer able to meet its contractual obligations to the plaintiffs. It is a clear abuse of s. 346 of the CA 2016.

No Extant Oppression

[125] There is yet another reason why the plaintiffs' claims are unsustainable.

[126] There must be an extant oppression at the time of filing of the case. This is clear from the Privy Council's case of *Galantis v. Alexiou* [2019] 1 WLR 3636. In that case, the respondent sold his shareholding in a Bahamian company ('BKH') in 1998, with its interest in a lease and its inventory of goods, to another company ('company'). At that date, the directors of the company were the first and second appellants. The company paid some cash towards the purchase price. The company only paid a small amount of the balance but refused to make further payments. The respondent

sued the company and obtained a judgment for the balance, but the company did not satisfy that judgment. In 2007, the respondent submitted that the company's failure to pay involved unfair and oppressive conduct on the part of the appellants, in particular because he had learned that the business that he had sold to the company had been converted by the first appellant to another company.

[127] The Privy Council held that there must be an ongoing oppression at the time of the filing of the action:

> Section 280 of the Companies Act 1992 had no application unless, at the date of commencement of the s. 280 proceedings, there was ongoing oppression that was capable of being remedied by the court's intervention in the affairs of an existing company ...

And at para. [22]

> [22] ... Rather, it is necessary that oppression should exist at that date as a state of affairs requiring restraint or remedy. *The remedies set out in s. 280(3) are means by which an existing state of affairs may be remedied and are clearly focused on a situation where the company still exists. They are directed at the way in which the company or those concerned with its business must act*. The proceedings must, therefore, be timely in the sense that intercession by the court must be capable of correcting an existing wrong. In the present case, however, it is difficult to conclude that the oppression was current when the proceedings were commenced ... Intervention by the court in the internal affairs of the company was no longer possible. This was not a situation in which the court was able 'to intercede in the affairs and operation of a corporation and to effectively override the decisions of those charged with the responsibility of corporate governance. (*Budd v. Gentra*, para 33, see para [13] above).
>
> [23] ... It appears, therefore, that under s. 280 an order may be made against a present director but not a past director. *This supports the view that s. 280 is intended to apply to a situation where a company is still functioning and is addressed to oppression which can be remedied by the court's intervention in the affairs of the company*.
>
> (emphasis added)

[128] In *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung* [1978] 1 LNS 170; [1978] 2 MLJ 227, the Privy Council observed upon the Malaysian s. 181 of the CA 1965 and held at p. 229D to F:

> Thirdly, in a number of United Kingdom decisions it has been held that **for s. 210 to apply the complainant must show oppression continuing up to the date of proceedings** (e.g. *In re Jermyn Street Turkish Baths Ltd* 1971 1 WLR 1042); where there has been oppression in the past, the section does not bite. **Their Lordships agree that the wording of the section (and the same is true of s. 181(1)(a)) relates to a present state of affairs**: "are being conducted", powers "are being exercised" are grammatically clear:

> the language may be contrasted with that of s. 181(1)(b) which refers to an act of the company which has been done or threatened. But this argument must not be taken too far. What is attacked by sub-section (1)(a) is not particular acts but the manner in which the affairs of the company are being conducted or the powers of the directors exercised. And these may be held to be "oppressive" or "in disregard" even though a particular objectionable act may have been remedied. A last minute correction by the majority may well leave open a finding that, as shown by its conduct over a period, a firm tendency or propensity still exists at the time of the proceedings to oppress the minority or to disregard its interests so calling for a remedy under the section. This point is well brought out in *Re Bright Pine Mills Pty Ltd* [1969] VR 1002, 1011-2.
>
> (emphasis added)

[129] In the present case, the plaintiffs' complaints are that the second and third defendants had permitted the first defendant to continue trading with Megasteel despite the accumulation of trade receivables and the deteriorating financial situations of Megasteel. However, the factual matrix for the complaints (even if amounting to oppressive conduct) ended when the first defendant ceased operation around 31 January 2016 or earlier. There were no further drawdowns that were made from the plaintiffs. There is no oppression that the court can remedy.

[130] The fact that the debt remains outstanding is not sufficient to qualify as an interest that is presently being oppressed. In *Galantis* (*supra*), the fact that the balance of the purchase price remained outstanding did not mean that the oppression was in existence that would allow court remedy. The court held at para [22]:

> [22] In the Board's view, to suggest that, notwithstanding the dissolution of the company, oppression continues in perpetuity until such time as the judgment debt may be paid, stretches the concept of oppression too far. It is unrealistic to suggest in the present case that there existed at the time these proceedings were commenced 'an interest which is presently being oppressed'.

[131] Hence, when the OS was filed on 10 May 2019, there was no oppression in existence capable of being remedied by this Honourable Court. For this reason, s. 346 has no application.

[132] Further, with reference to the OS, the plaintiffs seek, amongst others, an order that the defendants jointly and severally pay to the first and second plaintiffs the respective amounts alleged to be due and payable to each of them as at 31 March 2019 together with interest computed thereon in accordance with the provisions of the facilities agreement.

[133] To this end, the relief sought by the plaintiffs are in essence, repayment of sums due and payable pursuant to the facilities. The matters complained of boil down to the first defendant's purported breach of the terms of the facilities agreement and the first defendant's continued trading with Megasteel.

[134] Insofar as continued trading with Megasteel is concerned, an order for repayment will not remedy this purported oppressive act. In any event, the first defendant has already ceased trading with Megasteel some four years ago.

[135] Insofar as breach of the terms of the facilities is concerned, the relief sought by the plaintiffs flows from breaches of the facilities, for which they have contractual remedies.

[136] All these go to show that the launching of the OS herein by the plaintiffs is a disguised debt collection action aimed towards the second and third defendants against whom the plaintiffs have no express securities. As such, it is brought to achieve a collateral purpose and is an abuse of process (see *Re Bellador Silk Ltd* [1965] 1 All ER 667 at p. 672A-B).

Plaintiffs Have The Power To Stop The Alleged Oppressive Acts

[137] I also agree with learned counsel for the first defendant that an action under s. 346 does not lie where a claimant has the power to stop the allegedly oppressive acts and/or possesses the power to exercise self-help. The power to stop the oppressive or unfairly prejudicial acts or to exercise self-help negates "unfair prejudice" as control rests with the claimant.

[138] The Singapore Court of Appeal in *Ng Kek Wee v. Sim City Technology* [2014] SGCA 47 at [48] - [50] has this to say:

> 48. In our judgment, the touchstone is not whether the claimant is a minority shareholder of the company in question, but whether he lacks the power to stop the allegedly oppressive acts. Section 216(1) of the Companies Act states only that "any member ... of a company" may bring an action for relief under that provision; there is no further requirement that only members who are minority shareholders are so entitled. Having regard to the purpose underlying s. 216, we think the correct position is that where a member is able to remedy any prejudice or discrimination he has suffered through the ordinary powers he possesses by virtue of his position, the conduct of the defendant cannot be said to be unfair to him: see also the *dicta* of Knox J in *Re Baltic Real Estate Ltd (No 2)* [1993] BCLC 503 at 507. Section 216 of the Companies Act is, save for a few minor amendments, based on s. 210 of the UK Companies Act 1948 (c 38) (UK) ("the UK [2014] 4 SLR 0723.fm Page 737 Wednesday, December 3, 2014 3:32 PM 738 SINGAPORE LAW REPORTS [2014] 4 SLR Companies Act 1948") and s. 186 of the Australian Companies Act 1961 (which was also essentially identical to the English provision): see cl. 181 of the Companies Bill 1966, which became our Companies Act (Act 42 of 1967). Section 210 of the UK Companies Act 1948 came about following a recommendation made by the Cohen Committee of 1945 that the position of minority shareholders of a private company in resisting oppression by the majority shareholders or the controllers of a company should be strengthened: Report of the Committee on Company Law Amendment (Cmnd 6059, 1945) at para 60. The effective protection of minorities was

again emphasised in the report of the Jenkins Committee some years later in respect of possible amendments to the section: *Report of the Company Law Committee* (Cmnd 1749, 1962) ("the Jenkins Report") at para 200. In *Re Legal Costs Negotiators Ltd* [1999] BCC 547 ("Re Legal Costs"), Gibson LJ examined these English oppression provisions, which, as we have shown above, are directly relevant to our s. 216, and concluded that:

> ... there is academic and judicial consensus as to the meaning of the section and as to the mischief which it was intended to cure, *viz*. the abuse of power to the prejudice of shareholders who lack the power to stop that abuse.

49. We think this is correct in principle. *It would be contrary to the purpose and intent of s. 216 of the Companies Act to permit a shareholder to seek relief where he possesses the power to exercise self-help by taking control of the company and bringing to an end the prejudicial state of affairs*: see *Re Legal Costs* at 552. As was observed by Margaret Chew in *Minority Shareholders' Rights and Remedies* (LexisNexis, 2nd Ed, 2007) ("Chew") at pp 219-220:

> The pertinent issue is to ascertain whether an applicant alleging oppression under s. 216 of the Companies Act has control over the affairs of the company, for there is good sense in saying that an applicant ought to lack such control. Evidently, an applicant that is in control of the affairs of the company cannot convincingly allege to have been oppressed ...

(emphasis added)

[139] In *Kumagai Gumi Co Ltd v. Zenecon-Kumagai Sdn Bhd & Ors And Another Application* [1994] 1 LNS 73; [1994] 2 MLJ 789, the Malaysian High Court held that a claim for relief from oppression was (at p. 808):

> ... available to majority shareholders who are not in control of the management of the company and who, for any given reason, are unable to control the board, eg, because they have agreed to a management power sharing formula in a separate agreement among the shareholders.

[140] The plaintiffs, pursuant to and in connection with the facilities, obtained a multitude of securities from the first defendant, including the debenture and the deed of assignment of offtake agreement. These accorded the plaintiffs' significant rights and powers over the assets and undertaking of the first defendant.

[141] The debenture encompasses all the assets and undertaking of the first defendant including the DRI plant. The plaintiffs are empowered to, *inter alia*, take control of the charged assets and to appoint a receiver and manager over the charged assets or any part thereof. The powers accorded to such receiver and manager under the debenture include the powers to take possession of the charged assets, to manage the business of the first defendant and to sell or realise the charged assets.

[142] Pursuant to the deed of assignment of offtake agreement, the first defendant assigned to the first plaintiff all of the first defendant's rights, title, interest and benefits in and to the offtake agreement and the first defendant's right of enforcement thereunder.

[143] The plaintiffs also have rights under the facilities in respect of the facilities extended, which the plaintiffs appears to have in part exercised (for example, the variation of facility limit pursuant to cl. 2.5 of the facilities agreement alluded to in para. 37 of the plaintiffs' OS AIS and the appointment of a monitoring accountant for a period of approximately 1.5 years from January 2015).

[144] Clearly, through the securities obtained in respect of the banking facilities extended to the first defendant and the powers conferred under the facilities and the securities thereto, the plaintiffs at all material times had, and have, the means or power to put an end to the alleged oppressive acts complained of, but have chosen not to and instead bring this action.

[145] Accordingly, it cannot be said that the plaintiffs had no control over the first defendant's transactions with Megasteel. They were able to appoint a receiver and manager to take control of the first defendant's business and discontinue the supply to Megasteel, if they wanted to.

[146] For the reason again, the plaintiffs' OS cannot be sustained.

Conclusion

[147] For the above reasons, the OS is struck out with costs fixed at RM10,000 to be paid by the plaintiffs to each sets of defendants subject to the payment of allocatur.